

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ORIGINAL

FRANCIS FOGARTY, JR.,

Plaintiff,

Civil Case No. 15-v-01454
(GLS/DJS)

-against-

CITY OF TROY and City of Troy Police Officers KYLE JONES and ROBERT SMITH, both individually and/or as agents, servants, and/or employees of the City of Troy,

Defendants

EXAMINATION BEFORE TRIAL of the Defendant, Troy Police Officer **KYLE JONES**, held pursuant to notice, on January 23, 2017, at 11:05 a.m. in the law offices of Bailey, Johnson, DeLeonardis & Peck, PC, Pine West Plaza 5, Suite 507, Washington Avenue Extension, Albany, New York, before Mary Ellen Tardiff, a Shorthand Reporter and Notary Public in and for the State of New York.

APPEARANCES:

For the Plaintiff:

THE KINDLON LAW FIRM, PLLC
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Albany, New York 12207
GENNARO D. CALABRESE, ESQ.

For the Defendant City of Troy:

RICHARD T. MORRISSEY, ESQ.
Corporation Counsel
City of Troy
245 River Street
Troy, New York 12180

For the Defendants Kyle Jones and Robert Smith:

Bailey, Johnson, DeLeonardis & Peck, PC
Pine West Plaza 5, Suite 507
Washington Avenue Extension
Albany, New York 12205
BY: JOHN W. BAILEY, ESQ.

Also Present:

Robert Smith

S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that presence and oath of a Referee be waived;

IT IS FURTHER STIPULATED AND AGREED that the transcript be signed and that the filing of the original transcript with the Federal Court be waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to form, are reserved until the time of trial;

IT IS FURTHER STIPULATED AND AGREED that this

1 of your employment as a City of Troy police officer?

2 A. Correct.

3 Q. What materials, if any, did you review
4 prior to coming to this deposition?

5 A. The materials were the incident reports,
6 some audio files of Internal Affairs, things like that
7 pertaining to the arrest report and incident report.
8 Things of that nature.

9 Q. Did you have any notes that you've taken
10 that you reviewed prior to coming here today?

11 A. No.

12 Q. So would it be fair to say any documents
13 reviewed were documents that are in the possession of
14 the City of Troy Police Department?

15 A. Yes.

16 Q. Okay. Now, beside your attorneys, did you
17 speak to anyone in preparation of today's deposition?

18 A. No.

19 Q. Is it fair to say you're currently
20 employed by the City of Troy Police Department?

21 A. Yes, I am.

22 Q. How long have you been employed by them?

23 A. Almost six years.

1 words and, as you said, flailing their arms. What did
2 you observe happen next?

3 A. There was, there was yelling and screaming.
4 There was pushing and shoving, physical fight.

5 Q. Between whom?

6 A. Between Mr. Fogarty and another patron or
7 citizen, bystander standing on the sidewalk.

8 Q. As you sit here today do you remember who
9 that was?

10 A. I don't.

11 Q. So how much time lapsed between his
12 confrontation with Miss Fogarty and him exchanging
13 shoves with another individual?

14 MR. BAILEY: Object to the form.

15 You can answer.

16 A. I'm trying to just answer the best I can.
17 The time between the argument or disagreement between
18 Miss Fogarty and then the citizen, the other bystander?
19 Is that what you're asking?

20 Q. It's my understanding you testified there
21 was some pushing and shoving that you observed?

22 A. Yes.

23 Q. Who was that between?

1 A. That initially was between the citizen and
2 Mr. Fogarty.

3 Q. Okay. So how much time lapsed between
4 when you observed Mr. Fogarty and the other citizen
5 making contact and Mr. Fogarty and Miss Fogarty having
6 a verbal confrontation?

7 MR. BAILEY: Object to the form.

8 A. I mean I could try to give you --

9 MR. BAILEY: Yes. It's not
10 appropriate for me to intervene, but I
11 do object to the form. You want to go
12 off the record for one second?

13 (Discussion was held off the
14 record.)

15 Q. So there came a point in time where you're
16 sitting in the patrol car, correct?

17 A. Yes, sir.

18 Q. And you see a confrontation between whom
19 you now know to be Miss Fogarty and Mr. Fogarty?

20 A. Correct.

21 Q. It's my understanding what you saw was the
22 exchange of words and hand movements?

23 A. Yes.

1 you know, as far as my attention always drawn to him,
2 there was a lot of people there moving around. So, you
3 know, my attention bounced between other subjects that
4 were there. But he didn't leave the area.

5 Q. What, if anything, did you do when you
6 observed Mr. Fogarty and Miss Fogarty have physical
7 contact with each other?

8 A. I got out of my patrol car and tried to
9 speak with Mr. Fogarty.

10 Q. Okay. And when you say "tried to speak
11 with" him, why do you say "try"?

12 A. It was difficult to get his attention. He
13 was agitated. He appeared as though he was
14 intoxicated. He, you know, didn't necessarily care or
15 understand that a police officer in uniform, you know,
16 there was a presence, that I was there. And he didn't
17 care that I was there or I was even explaining to him,
18 listen to me. You need to stop what you're doing.

19 Q. When you walked out of your patrol car,
20 fair to say you walked directly over to where Mr.
21 Fogarty was?

22 A. Yes.

23 Q. What, if anything, did you do to get his

1 attention?

2 A. I don't remember my, the context of my exact
3 words. But, you know, I would imagine I'd say, hey,
4 sir. Hey, buddy. Something to that nature to get his
5 attention. Stop. Look at me. Talk to me. Something
6 of those, of that nature.

7 Q. Did he -- did he say anything to you when
8 you were approaching him?

9 A. Not that I can remember.

10 Q. After you said something to him, do you
11 remember him saying anything to you at that point?

12 A. I mean, the exchange between myself and him
13 is specifically when I was trying to arrest him. And I
14 was telling him he was under arrest and that to put his
15 hands behind his back. What I recall about the
16 incident was him saying, you're not going to arrest me.
17 I don't do anything wrong. Arrest her. He didn't want
18 to be arrested.

19 Q. Where did this take place? Was it on the
20 sidewalk, in the street, or someplace else?

21 A. I remember it being in the street. I mean,
22 it could have carried over from the sidewalk and back
23 at the street. We weren't stationary, you know. We

1 They had -- he was involved in a verbal altercation.
2 He was flailing his arms around. That escalated to
3 some physical altercations between Mrs. Fogarty and
4 another, another citizen that was there where other
5 people were just simply standing around not fighting,
6 Mr. Fogarty, you know, had committed, had committed a
7 crime. Was yelling and screaming and causing a
8 disturbance. So my attention focused towards him.

9 Q. When you say he committed a crime, what
10 penal law or what penal violations did he commit?

11 A. Initially when he, you know, slapped or
12 punched or physically contacted another person, either
13 Mrs. Fogarty or the other citizen on the road or the
14 sidewalk, he committed harassment. You know, the penal
15 law violation of harassment.

16 Q. So when you told -- you testified earlier
17 that you told Mr. Fogarty he was under arrest, right?

18 A. Yes, sir.

19 Q. And so is it fair to say that he was under
20 arrest for harassment second degree?

21 A. Yes.

22 Q. And you testified -- just so it's clear --
23 you testified earlier, just so it's clear for me, were

1 you arresting him for his physical contact with Miss
2 Fogarty, his physical contact with the other civilian,
3 or both?

4 A. I'd have to look at the context of the to
5 wit section in the harassment accusatory in order to,
6 you know, give you a very, very specific answer to
7 that. I mean, you know, he committed the violation and
8 that was why I approached him and started to place him
9 under arrest.

10 Q. Did you have any intention of also issuing
11 -- did you have any attention of also charging Miss
12 Fogarty with harassment second?

13 MR. BAILEY: Object to the form.

14 You can answer.

15 A. Intention of arresting her? I mean, look,
16 in a perfect world if I could have had more police
17 officers there and we could have arrested everybody
18 that was causing the issue, then it would have been
19 possible to do that. But I was only one person at the
20 time. So I had to pick, you know, the primary
21 aggressor, so to speak, which I determined to be Mr.
22 Fogarty and the fact that he, you know, harassed Mrs.
23 Fogarty and then also a citizen and then was escalating

1 him to put his hands behind his back to place him in
2 custody. He, as I said before he, you know, refused to
3 do that. He -- when I would try to grab his arms to
4 sort off of coach him to put his hands behind his back,
5 he violently pulled his hands away and his arms away.
6 He physically elbowed me in the face during the process
7 of me trying to place him under arrest. He continued
8 to resist arrest specifically pulling his hands away,
9 you know, refusing to listen to my orders.

10 And then subsequent Sarah Fogarty got involved.
11 She came from behind. Pulled me. Punched me. Pushed
12 me in a fashion to sort of keep me from arresting Mr.
13 Fogarty and then Mr. Fogarty, because of that sort of
14 interruption, he was able to get up and run away.

15 Q. Where did Mrs. Fogarty punch you?

16 A. From what I remember she came from behind,
17 so like my back or side. Grabbed at me to try to get
18 me, to pull me away from Mr. Fogarty.

19 Q. And you said Mr. Fogarty was able to get
20 up and run?

21 A. Correct.

22 Q. At what point was he on the floor?

23 MR. BAILEY: Object to the form.

1 A. I don't remember if I was equipped with one
2 that night.

3 Q. You had a baton on you, right?

4 A. Yes.

5 Q. When you stepped out of the patrol car and
6 walked toward Mr. Fogarty, did you have your baton in
7 hand?

8 A. I don't specifically remember if I had it in
9 my hand or holstered when I first exited the vehicle.
10 At some point in time I did have, throughout that
11 altercation I did have the baton in my hand because I
12 recall when I was running I was holding onto it so it
13 wouldn't fall out or get lost.

14 Q. Do you remember at what point you took it
15 out?

16 A. Specifically, I do not. During, during that
17 incident I remember having it out. Specifically when,
18 I don't remember.

19 Q. Before you got out of the patrol car did
20 you use the radio?

21 A. What do you mean by "use the radio"?

22 Q. Did you call in stating that there are
23 physical altercations outside of Bootlegger's?

1 A. At some point in time I did, yes, get on the
2 radio, notify the dispatcher of my location and what
3 type of incident I had.

4 Q. Do you remember whether or not you did
5 that before you approached Mr. Fogarty?

6 A. I don't. There is a record of it but, you
7 know, I haven't -- it's been almost four years and I
8 haven't listened to it since then. So I don't -- I
9 mean, specifically what the transmissions were, I
10 don't. I assume there's a record still on file and
11 that can be reviewed, but I don't remember.

12 Q. Have you ever made an arrest in front of
13 Bootlegger's before?

14 A. I can't specifically -- like, there isn't an
15 arrest that stands out. It's possible that I did and
16 it's possible that I haven't either. I don't remember
17 specifically anyone that stands out in front of
18 Bootlegger's.

19 Q. Prior to this incident at any point in
20 time did you ever review the security footage -- let
21 me withdraw that and say that again. Prior to your
22 interaction with Mr. Fogarty, at any point in time in
23 your role as a Troy police officer did you have the

1 Q. I understand. But I just want to make
2 clear that you're testimony is not that he was
3 intentionally trying to strike or hit or, you know,
4 combat either you or Officer Smith?

5 MR. BAILEY: I object to the form.

6 The answer speaks for itself. But to
7 the extent you can answer that, go
8 ahead.

9 A. It's hard to understand what his intentions
10 were. I mean, as you just stated, he struck a female
11 right in front of a police officer. So what his
12 intentions were, I don't know. I did not, from my
13 perspective and point of view, see him strike Officer
14 Smith. But was it his intention to do that to get
15 away? That's a possibility. I simply don't know what
16 his intentions were.

17 Q. All right. So what happened next?

18 A. I delivered two baton strikes in rapid
19 succession from within close proximity to Mr. Fogarty's
20 right shoulder, upper torso. After the baton strikes,
21 Mr. Fogarty started to comply meaning that he stopped
22 physically trying to get away, flailing his arms,
23 kicking his feet, pulling away from Officer Smith and